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No. 05-785

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

THOMAS L. CAREY, Warden,

Petitioner,

v.

MATHEW G. MUSLADIN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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ARGUMENT

A. The Ninth Circuit Erroneously Relied On Circuit Law To Define "Clearly Established Federal Law" For Purposes of 28 U.S.C. § 2254(d)(1)

Respondent acknowledges that circuit law has no role in shaping clearly established law under AEDPA. Resp. Br. 16-20. He denies that the Ninth Circuit so used *Norris* v. *Risley*, 918 F.2d 828 (9th Cir. 1990), however, and maintains that circuit law may define or determine the "meaning" of this Court's clearly established federal law so long as it is not a "source" of that law. See Pet. Br. 16-17, 18 (stating decisions of this Court are only "source" of clearly established law), 20-21 (stating circuit court may look to circuit law to "assess meaning" of general rules). He is incorrect on both counts.

The Ninth Circuit expressly invoked *Norris both* to "determine" and to define the clearly established federal law's "meaning." Pet. App. 7a-9a, 13a-14a. It plainly and specifically overturned the state court of appeal decision because it was contrary to *Norris*. Pet. App. 6a, 9a, 13a-15a.

True, as respondent observes, before mentioning *Norris* v. *Risley*, 918 F.2d 828, the Ninth Circuit described as "clearly established" law the most closely applicable rule from this Court's decisions "that certain practices attendant to the conduct of a trial can create such an 'unacceptable risk of impermissible factors coming into play,' as to be 'inherently prejudicial' to a criminal defendant." Pet. App. 6a (citing *Holbrook* v. *Flynn*, 475 U.S. 560, 570 (1986) and *Estelle* v. *Williams*, 425 U.S. 501, 505 (1976)); see Resp. Br. 20. But it is not true that "by the time the Ninth Circuit turned to *Norris* in its 'clearly

established' analysis, the questions of whether the law was clearly established and the resolution of what that law was, were fait accomplis." Resp. Br. 19-20.

The Ninth Circuit's identification of "clearly established federal law" hardly began and ended with *Flynn* and *Williams*. Under the heading "Clearly Established Federal Law," the lower court stated that *Norris* had "persuasive value in an assessment of the meaning of the federal law that was clearly-established by *Williams* and *Flynn*." Pet. App. 6a. The federal court then characterized its "decision" respecting *Norris* was "to afford it persuasive weight when determining the federal law as established by *Williams*." Pet. App. 9a. The Ninth Circuit proceeded to fault the state court of appeal for an "unreasonable" application of *Norris*, stating that the state court "attempted to distinguish *Norris*, but *Norris* simply cannot be reasonably distinguished." Pet. App. 8a-9a, 13a-14a, 75a. This was error. The *only* clearly established federal law against which the state decision could be evaluated for reasonableness, if any, was *Flynn* and *Williams*, *not* "the *Williams* test, as it was explained in *Norris*."[1] Pet. App. 9a; see 28 U.S.C. § 2254(d)(1). That the Ninth Circuit identified *Flynn* and *Williams* as setting forth the clearly established law before invoking *Norris* is beside the point, both in the historical sense that *Norris* is the decision the Ninth

[1] Strictly speaking, what the Ninth Circuit refers to as the "*Williams* test" concerning "impermissible factors coming into play" was first set forth as a "test," or one of the relevant "questions" to be answered, in *Flynn*, 475 U.S. at 570. See Pet. App. 9a, 10a. The "impermissible factor" language in *Williams* was used in passing to describe the effect of a defendant's prison clothing, before the Court reached its conclusion that such clothing is inherently prejudicial. *Williams*, 425 U.S. at 505.

Circuit actually applied to grant respondent habeas relief and in the analytical sense that *Norris* should have had no place *at all* in the Ninth Circuit's view of "clearly established federal law."[2]

Respondent suggests that the meaning of general rules like the one in *Flynn* and *Williams* "must emerge in application over the course of time," Resp. Br. 16 (quoting *Yarborough* v. *Alvarado*, 541 U.S. 652, 664 (2004)), and that 28 U.S.C. § 2254(d)(1) permits habeas relief based on "the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced," Resp. Br. 16 (quoting *Lockyer* v. *Andrade*, 538 U.S. 63, 76 (2003)). This, respondent reasons, means the Ninth Circuit "properly considered the persuasive reasoning of *Norris* . . . in assessing the meaning of this general rule that has emerged in application over time." Resp. Br. 16-17. But *Alvarado* did not suggest that the meaning of "clearly established federal law" may "emerge" from circuit or state courts. See *Alvarado*, 541 U.S. at 663-64; see also *Kane* v. *Espitia*, 126 S. Ct. 407, 406, 163 L. Ed. 2d 10, 13 (2005) (recognizing circuit split on whether *Faretta* v. *California*, 422 U.S. 806 (1975) implied certain rights irrelevant since *Faretta*'s silence on issue barred habeas relief). The passage respondent quotes from *Alvarado* concerned the *reasonableness of application* of

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[2] In his Introduction, respondent suggests the basis for petitioner's claim that the Ninth Circuit relied on *Norris* is a single footnote in the Ninth Circuit's opinion. Resp. Br. 10; see Pet. App. 11a n.1. Petitioner in fact has never cited the footnote. Suffice it to say the Ninth Circuit decision mentions *Norris* by name or implicitly on almost every page. See Pet. App. 2a-15a. Far from a red-herring, Resp. Br. 10, it forms the nucleus of what effectively amounts to the Ninth Circuit's de novo review of the state-court decision.

this Court's law, not what law was clearly established for purposes of that case. *Id.*; see 28 U.S.C. § 2254(d)(1). The point of that passage is that states are entitled to more leeway to apply general rules, not that federal habeas courts are entitled to leeway in defining such rules. See *Alvarado*, 541 U.S. at 664.

Nor can mere euphemisms about the Ninth Circuit's misuse of *Norris* obscure the basic fallacy in respondent's argument. To condemn circuit law used to define or to serve as a source of clearly established federal law on one hand, yet to praise circuit law used to "assess the meaning" of clearly established federal law on the other, is to argue a distinction without a difference. The argument exists only to elide this: if a federal habeas court must look to federal circuit law or to state law for the "meaning" of a decision by this Court, then perforce that *meaning* is not "clearly established." Pet. Br. 17. Put differently, federal habeas relief that rests on the meaning of a general rule by this Court having "emerged" in a decision of another court improperly substitutes the latter court's law in lieu of this Court's clearly established law.

AEDPA affords federal courts no leeway to shape a clearly established rule of this Court under the guise that a general rule's true meaning can now "emerge" by granting relief in the habeas case *sub judice*. AEDPA requires quite the opposite. Federal habeas courts must give state courts *broader* discretion in applying this Court's general rules. *Yarborough* v. *Alvarado*, 541 U.S. at 664.

Respondent suggests that circuit law is useful "in confirming that this Court's decisions have in fact clearly created a rule of law." Resp. Br. 18. Actually, that practice is merely innocuous because it is unnecessary. See, *e.g.*,

Garcia v. *Carey*, 395 F.3d 1099, 1104 (9th Cir. 2005) (stating that *Jackson* v. *Virginia*, 443 U.S. 307, 324 (1979) standard for sufficiency of the evidence is "clearly established" for purposes of AEDPA). For example, a citation to a circuit decision holding *Holbrook* v. *Flynn*, 475 U.S. 560, and *Estelle* v. *Williams*, 427 U.S. 501, "clearly established" that some courtroom practices may be "so inherently prejudicial that [the defendant] was thereby denied his constitutional right to a fair trial" would add nothing not apparent from this Court's decisions.[3] *Flynn*, 475 U.S. at 570; see *Williams*, 427 U.S. at 501; Pet. App. 6a. At any rate, the Ninth Circuit did not cite *Norris*, a pre-AEDPA decision, as authority that *Flynn/Williams* is clearly established federal law. See Pet. App. 6a-9a.

Respondent also argues a kind of necessity exception to AEDPA, applicable here since the Ninth Circuit never said it "was necessary to use *Norris* to define what was clearly established law." Resp. Br. 22. He asserts: "Whenever a court takes a general of law and applies it to a given set of facts, its decision will give further 'definition' to the general rule, at least in some factual context. This is not

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[3] Respondent asserts petitioner waived its argument that, while the *Flynn/Williams* rule is clearly established, "it is not at all clearly established that the rule controls the instant circumstances." Resp. Br. 10-11; see Pet. Br. 15; Pet. App. 22a (Kleinfeld, J., dissenting from order denying rehearing en banc). Even assuming the dubious proposition that a party can waive the applicable law governing a claim, it is impossible to find waiver from the State's contention that *Flynn* and *Williams* do not require the granting of habeas relief in this case. Petitioner's chief point, in any event, was that the lack of clarity over whether *Flynn/Williams* governs the instant factual context of spectator behavior dictates heightened deference towards the state decision. Pet. Br. 15-16.

improper because such an undertaking does not change the general rule." Resp. Br. 22.

But whether the federal habeas court purportedly is "defining," "determining," Pet. App. 9a, or "assessing the meaning of," Pet. App. 7a, established federal law, circuit law cannot function as clearly established federal law, even in conjunction with a general rule such as in *Flynn* and *Williams*. Circuit applications of a general rule cannot "give further 'definition' to the general rule," Resp. Br. 22, where the only source of "clearly established federal law" is the holdings of this Court, 28 U.S.C. § 2254(d)(1). Respondent's argument, like the Ninth Circuit's decision below, attempts to make a general rule specific to a different context *without this Court first having demanded that specificity of state courts themselves*, thereby shrinking, rather than increasing, the leeway given to state courts in applying general rules. Such is not the law. See *Yarborough* v. *Alvarado*, 541 U.S. at 664.

B. The State Court's Application Of *Flynn* And *Williams* Was Objectively Reasonable

Respondent contends that "[w]ith or without *Norris*, the conclusion of the court of appeals was correct," because the state court of appeal unreasonably applied *Holbrook* v. *Flynn*, 475 U.S. 560 and *Estelle* v. *Williams*, 425 U.S. 501, Resp. Br. 28. He asserts that the state court of appeal "did not consider the effect of the buttons on Musladin's claim of self-defense—or on any other facts specific to Musladin's trial." Resp. Br. 29; see Resp. Br. 30. He reasons that because the state court did not find a prejudicial message in the three buttons, and did not expressly discuss "the effect of the buttons on Musladin's claim of self-defense," it

must not have considered the "nature of the proceedings and issues before the jury." Resp. Br. 28-29.

Preliminarily, respondent's effort to portray his defense case as constituting the relevant facts on this issue is unavailing. See Resp. Br. 1-4; cf. Pet. App. 55a-60a (state court of appeal), 32a-33a (district court). The state court of appeal necessarily viewed the evidence in the light most favorable to the State and presumed in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. See *People* v. *Vann*, 12 Cal. 3d 220, 225, 115 Cal. Rptr. 352, 355-56, 524 P.2d 824, 827-28 (1974). Respondent also describes evidence not admitted at trial, impliedly suggesting that it bolstered his defense. See Resp. Br. 4. Suffice to say, the state courts and district court concluded the evidence was properly excluded. See also Pet. App. 18a ("The petitioner also asserts a number of other claims that he argues merit habeas relief. I would reject those claims as well, and would thus affirm the district court." (Thompson, J., dissenting)). No less unavailing is petitioner's oblique insertion of the "fact," never before proffered to any court, that the photograph on the buttons "depicted [Tom Studer] in a manner inconsistent with the reality of his appearance on the day in question." Resp. Br. 9. No evidence shows how the buttons depicted the victim, to say nothing of a purported inconsistency of the depiction with "reality." J.A. 8. The Ninth Circuit, without having the buttons before it, gave a similar baseless description of them as "representing" Mr. Studer "as the innocent party, or victim," Pet. App. 13a. These inventions cannot erase the fact that the state trial court found no prejudice ensued to petitioner after it had viewed the buttons in the trial courtroom. J.A. 4.

At any rate, it is not the clearly established law of this Court that the facts and issues to be determined at a particular trial—as distinct from the facts surrounding the challenged courtroom practice—must be considered in determining whether *inherent* prejudice lies. Although the Court suggested such factors were relevant in *Estelle* v. *Williams*, 425 U.S. at 506-08, and arguably in *Holbrook* v. *Flynn*, 475 U.S. at 569, respondent's asserted requirement appears to stem from the Ninth Circuit's holding below, not the previous holdings of this Court. Resp. Br. 33; see Pet. App. 14a. The fact that certain circumstances were considered in a case that clearly established a principle does not necessarily make that circumstance part of the "clearly established" formulation. Cf. *Kane* v. *Espitia*, 126 S. Ct. at 406 (recognizing that *Faretta* v. *California*, 422 U.S. 806 "clearly established" a right to self-representation, but had said nothing about any attending legal aid for self-represented defendants).

Here, the state trial and court of appeal, and district court, were all aware of respondent's self-defense claim at trial when they concluded the buttons were not inherently prejudicial.[4] See Pet. App. 32a-35a, 47a-50a, 58a-60a,

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[4] Respondent discounts the state trial judge's finding that the buttons were not prejudicial by noting such finding was made *before* trial, when it "presumably" was unaware of respondent's self-defense claim. Resp. Br. 29. To the contrary, respondent's trial counsel's brief had previously informed the trial judge, "The defense in this case is that the killing was done in self defense." CT 349 & 365; see CT 335, 390; see also CT 357 (identity not contested). Further, California trial judges are obliged at all times to take steps to promote an effective ascertainment of the truth regarding the matters involved. Cal. Penal Code § 1044; *People* v. *Cox*, 53 Cal. 3d 618, 700, 809 P.2d 351, 401, 280 Cal. Rptr. 692, 742 (1991). Had the trial judge at any point concluded the buttons were prejudicial in light of the evidence or issues being presented, it presumably would have acted accordingly.

74a-75a; J.A. 4. That the state court did not expressly discuss the effect of the buttons in light of respondent's self-defense claim does not demonstrate such circumstances were disregarded. Rather, they were implicitly considered absent some affirmative indication to the contrary. See generally *Woodford* v. *Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (noting state court decisions to be given benefit of doubt under AEDPA). As for the message sent by the buttons, it is apparent the state court of appeal found that the buttons conveyed no clear message at all—regardless of the nature of the proceedings. See Pet. App. 74a-75a. As reflected in *Flynn*, a consideration of the nature of the proceedings and issues before the jury does not necessarily yield a conclusion that the challenged courtroom practice sent a prejudicial message. See *Holbrook* v. *Flynn*, 475 U.S. at 568-71. Such was the case here.

Respondent does not dispute that with the exception of the present case, "there does not appear to be any decision reversing a judgment on the basis of spectators wearing buttons bearing photographs of a victim." Pet. Br. 29; see Resp. Br. 30-32. As to the numerous cases rejecting a finding of inherent prejudice in this context, respondent broadly asserts, "There are a host of reasons why these cases do not mean what the State claims they mean." Resp. Br. 30; see Pet. Br. 29-30. He offers no support or explanation, just an argument that the state "misses the fact that virtually all of these cases condemn the practice of having buttons, or similar communicative garb such as T-shirts, worn by trial spectators in a jury trial."[5] Resp. Br.

[5] To the extent respondent suggests a *rule* or prohibition exists against the wearing of buttons by trial spectators, he is incorrect. See Resp. Br. 30 & 32 (stating courts "condemn" practice). As the citations

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30-31. A disfavored practice, however, is not necessarily an inherently prejudicial one, let alone one that warrants habeas relief under 28 U.S.C. § 2254(d)(1). Cf. *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 642-43 (1974) ("'Before a federal court may overturn a conviction resulting from a state trial in which this instruction was used, it must be established not merely that the instruction is undesirable, erroneous, or even "universally condemned," but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment.'" (quoting *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973))). Indeed, the state court of appeal here acknowledged that the wearing of buttons "should be discouraged." Pet. App. 75a; see also Pet. App. 49a-50a ((district court) "allowing the buttons was arguably not a prudent decision").

The point is not to suggest a rule permitting the wearing of buttons or other garb in all circumstances, but to show the reasonableness of the state court of appeal's decision that the buttons worn in this case were not inherently prejudicial. That decision comports with every published decision to have considered the specific question of photo buttons, factual or procedural variations in the cases notwithstanding. See Pet. Br. 29-30. As Amici points out, that fact alone should demonstrate the state court's decision was reasonable. Br. of *Amicus Curiae* of the Crim. Justice Legal Found. 8-13. The Ninth Circuit inexplicably disregarded the several photo button cases supporting the state court of appeal's decision and instead granted habeas relief based upon a single pre-AEDPA circuit case, which

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in respondent's brief reflect, it is more accurate to say it evokes supervisory oversight. See Resp. Br. 31-32 n.4.

did not involve a photo, but the slogan, "Women Against Rape."

C. The Ninth Circuit's Conclusion That The State Court's Analysis Was Contrary To This Court's Clearly Established Holdings Was Erroneous

Respondent claims the Ninth Circuit correctly found the state appellate court's description of the test for inherent prejudice was "contrary to" and unreasonably applied *Holbrook* v. *Flynn*, 475 U.S. 560, and *Estelle* v. *Williams*, 425 U.S. 501. Resp. Br. 23; see 28 U.S.C. § 2254(d)(1); Pet. App. 75a. His formalistic reading of a single sentence from the state court's opinion, Pet. App. 75a, cannot withstand this Court's pronouncements that the "fair import," or substance of the state court's analysis, rather than its grammatical precision, governs the propriety of habeas relief under 28 U.S.C. § 2254(d)(1). See *Woodford* v. *Visciotti*, 537 U.S. at 24; *Early* v. *Packer*, 537 U.S. 3, 9 (2002) (per curiam); Pet. Br. 31-32. As Amici points out, Congress surely did not intend to permit AEDPA limitations on habeas relief to be evaded by such games of "gotcha." Br. of *Amicus Curiae* of the Crim. Justice Legal Found. 15. The state court here arguably misspoke, but in substance reasonably applied this Court's precedent.

Despite respondent's precisionist reading of the last sentence of the state court's decision, the "fair import" of the opinion as a whole flatly precludes the meaning he and the Ninth Circuit ascribe to it. See *Woodford* v. *Visciotti*, 537 U.S. at 24; *Early* v. *Packer*, 537 U.S. at 9; Pet. Br. 32-33. The state court of appeal accurately stated the test for inherent prejudice; rejected respondent's reliance on *Norris* v. *Risley*, 918 F.2d 828; "discouraged" the wearing of

buttons generally; and found the buttons did not "brand" respondent with an "unmistakable mark of guilt"—language this Court itself used to conclude that inherent prejudice had not been shown in *Holbrook* v. *Flynn*, 475 U.S. at 570-71. See Pet. Br. 32-33; Pet. App. 74a-75a (quoting *Flynn*, 475 U.S. at 570-71). Even assuming the state court intended to describe the "wearing of photographs of victims in a courtroom" generally to be an "impermissible factor," and therefore inherently prejudicial, the state court immediately distinguished "the buttons in *this* case" as an exception to that categorization. Pet. App. 75a (emphasis added); see Pet. Br. 32-33. In short, the state court's opinion reflects a finding that these buttons were *not* inherently prejudicial.

Attempting to bolster his interpretation of the state court of appeal's language, respondent suggests that the state court "fell prey" to confusion created by *Woods* v. *Dugger*, 923 F.2d 1454 (11th Cir. 1991). Resp. Br. 25-26. If anything, *Woods* demonstrates that a court's arguably inarticulate recitation of a test need not nullify that court's reasoning or application of the test. *Woods* involved a defendant whose trial for the murder of a correctional officer was attended by numerous uniformed correctional officers, not present for reasons of security. *Woods*, 923 F.2d at 1457-59. The court in *Woods* correctly stated the test for inherent prejudice is "whether 'an unacceptable risk is presented of impermissible factors coming into play.'" *Holbrook* v. *Flynn*, 475 U.S. at 570 (quoting *Estelle* v. *Williams*, 425 U.S. at 505). The court said: "This test requires us to examine two factors: first, whether there is an 'impermissible factor coming into play' and second, whether it poses an 'unacceptable risk.'" *Woods* v. *Dugger*, 923 F.2d at 1457. The state court of appeals here quoted

Woods's description of the *Flynn/Williams* test. Pet. App. 74a.

Woods's description of the *Flynn/Williams* test is arguably imprecise, insofar as the relevant "risk" at issue in the "impermissible factors" test is that an impermissible factor *will* come into play. Cf. *Holbrook* v. *Flynn*, 475 U.S. at 571 ("we simply cannot find an *unacceptable risk of prejudice* in the spectacle" (emphasis added)). *Woods*'s seeming reconfiguring of the elements of the *Flynn/Williams* test does not, however, reflect a decision materially different than, let alone "contrary to," this Court's precedent.[6] *Woods* bears this out when, after purportedly misdescribing the test, it concluded "there was 'an unacceptable risk [of] impermissible factors coming into play.'" *Woods* v. *Dugger*, 923 F.2d at 1459 (quoting *Holbrook* v. *Flynn*, 475 U.S. at 570, brackets in *Woods*). While a state court's description of an applicable test may be relevant to the inquiry whether the resulting analysis withstands § 2254(d)(1), it is the "fair import" of the state court's analysis that is determinative. See *Early* v. *Packer*, 537 U.S. at 9.

Respondent argues the Ninth Circuit correctly found the state court imposed "an additional and unduly burdensome requirement" on him when it found the buttons did not "brand" him "with an unmistakable mark of guilt." Pet. App. 10a, 75a; Resp. Br. 26-27. His position rests,

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[6] Indeed, before the California Supreme Court and district court, respondent himself urged the *Woods* test he challenges now. Pet. App. 47a; Memo. of Points and Auth. in Supp. of Pet. for Writ of Habeas Corpus 37 (filed June 5, 2000), Answer to Order to Show Cause Exh. I at 33 (filed May 14, 2001), in *Musladin* v. *Lamarque*, U.S.D.C., N.D. Cal. No. C 00-1998 JL (PR).

however, on the faulty premise that the state court had already found inherent prejudice, and should have ended its inquiry. See Resp. Br. 26-27. That premise is flawed as petitioner has shown. Pet. Br. 33-35.

Respondent asserts that the state court of appeal's finding that buttons are an "impermissible factor," coupled with its finding that the buttons here did not "brand" him "with an unmistakable mark of guilt," means either (1) the "branding" language was an additional requirement distinct from the *Flynn/Williams* test, or (2) "the buttons were not an impermissible factor." Resp. Br. 26. Respondent reasons that the first interpretation is reasonable, because the second "would render the state court's decision internally inconsistent." Resp. Br. 26. See *Woodford* v. *Visciotti*, 537 U.S. at 24. Not surprisingly, he urges this Court to glean constitutional error over mere grammatical inconsistency. But AEDPA gives the state court, not the habeas petitioner, the benefit of the doubt in interpreting state decisions. In any event, respondent's argument rests on the flawed premise that the state court's describing the wearing of buttons as an "impermissible factor" means it found the buttons here were inherently prejudicial. "[T]he state court's 'impermissible factor' comment is most reasonably understood as reflecting that court's view that buttons bearing a victim's photograph should not be worn in a courtroom." Pet. App. 17a (Thompson, J., dissenting). There is no internal inconsistency in the state court of appeal opinion.

Respondent mischaracterizes petitioner's discussion of the "branding" test as an alternative to the *Williams/Flynn* test. See Pet. Br. 33-35. He asserts, "the State argues that because the 'branding' standard is an alternate test for inherent prejudice, the state-court decision was not contrary

to or an unreasonable application of the *Williams/Flynn* principle." Resp. Br. 26. Rather, as petitioner has contended, the Ninth Circuit's analysis fails under its own precedent, because the Ninth Circuit *itself* considers the "branding" language to be an alternative to the *Flynn/Williams* test. Pet. Br. 34-35. The Ninth Circuit could not, in other words, logically find that the state court's "branding" language was an additional and different requirement from that set forth in the *Flynn/Williams* test. Pet. Br. 34. As petitioner expressly stated, his point was not that the two tests were equivalent, but rather that the Ninth Circuit's reasoning was unsound. Pet. Br. 35.

Last, respondent urges that "the state court properly found that an impermissible factor had come into play—a factual determination that the State would seemingly agree, is entitled to great deference from all reviewing federal courts." Resp. Br. 27. Respondent's rhetorical device reflects a misunderstanding shared by the Ninth Circuit in this case. AEDPA is a limitation on habeas relief. It is not a tool by which federal courts are authorized to impute to state courts factual, legal, or mixed[7] findings not made in order to decide if the imputed findings are contrary to or an unreasonable application of established federal law. As petitioner has made clear, the state court viewed the wearing of buttons as an impermissible factor, not the wearing of buttons in *this* case as inherently prejudicial.

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[7] We disagree with respondent that a finding that an "impermissible factor" had come into play is a factual one. Such a conclusion implicates findings of fact and law. Presumably respondent boosts the mixed finding to one of fact in an attempt to gain the greater deference given to such findings. See 28 U.S.C. § 2254(e)(1).

D. Respondent Concedes The Alleged Error Is Not Structural

Respondent acknowledges that a courtroom practice found inherently prejudicial under *Holbrook* v. *Flynn*, 475 U.S. 560, or *Estelle* v. *Williams*, 425 U.S. 501, does not warrant habeas relief unless it "'had substantial and injurious effect or influence in determining the jury's verdict,'" *Brecht* v. *Abrahamson*, 507 U.S. 619, 638 (1993) (quoting *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946)). Resp. Br. 33. Respondent does not dispute that the Ninth Circuit incorrectly considered such error to be structural. See Resp. Br. 33-40. But see Br. in Opp'n. to Pet. for Writ of Cert. 24 ("[T]here is no indication that the Ninth Circuit treated this error as structural"). Instead, respondent claims that "because the State waived its harmless error defense, this Court need not undertake a harmless-error review." Resp. Br. 33. Respondent also argues the error was not harmless. Resp. Br. 36-40. His arguments lack merit.

Respondent distorts petitioner's contention. We assert contrary to the Ninth Circuit's decision that an inherently prejudicial courtroom practice is not structural error. As for waiver, the State can hardly be said to "waive" the circuit court's decision that harmless error review is legally impermissible. Nor does petitioner ask this Court itself to conduct harmless error review. Assuming constitutional error exists, the Ninth Circuit should review the record for harmlessness under *Brecht* v. *Abrahamson*, 507 U.S. at 638.

Assuming any error, harmless error review is essential in this case. At trial, respondent's objection was to the buttons being worn at a jury trial as opposed to a court

trial—not that the buttons had any special significance given the evidence in the case or petitioner's self-defense claim. The defense was tongue-tied in identifying actual prejudice arising from the particular buttons worn by a few grieving relatives quietly seated in the public gallery of the court. The defense did not request that a reproduction of the button be preserved as a court exhibit. Nor did counsel for petitioner recount the extent, if any, of the jury's opportunity to discern the photograph on the buttons in that particular courtroom. Counsel for petitioner neither described the photograph of Tom Studer, nor sought testimony from any juror or court officer concerning the visibility of the buttons. The trial judge, who viewed the buttons, noted that no legend appeared on them, just the photograph, and that they were not prejudicial to petitioner. J.A. 4; see Pet. Br. 38-39.

Respondent's argument reduces to a repetition of his claim that buttons depicting a homicide victim when worn by courtroom spectators are inherently prejudicial. See Resp. Br. 36-40. But *Deck* v. *Missouri*, 544 U.S. 622, 635 (2005), made clear that the inherently prejudicial feature of an impermissible courtroom practice, even one that is seen by the jury, does not amount to actual prejudice. It instead shifts the burden to the State of establishing harmlessness. The Ninth Circuit's conclusion that the alleged error was structural requires reversal.

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be reversed.

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Respectfully submitted,

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